84-1580

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 1PP

QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) unless the prosecution establishes that the declarant is unavailable to testify at trial.

2. Whether, if the court of appeals was correct that proof of unavailability is required, it should have ordered a remand hearing to determine the question of unavailability rather than ordering a new trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Constitution, statutes and rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 748 F.2d 812. The order amending that opinion (App., *infra*, 17a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1984. The order denying rehearing was entered on February 8, 1985 (App., *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * *, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, respondent was convicted on one count of conspiring to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846; two counts of using a telephone to facilitate a drug felony, in violation of 21 U.S.C. 843(b); one count of causing interstate travel to facilitate a drug felony, in violation of 18 U.S.C. 1952(a)(3); and one count of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment to be followed by a seven-year special parole term. The court of appeals reversed (App., *infra*, 1a-16a).

1. The evidence at trial is summarized in the opinion of the court of appeals (App., *infra*, 2a-5a). It showed that in September 1979 unindicted co-conspirator Michael McKeon approached respondent seeking a distribution "outlet" for methamphetamine. The two men agreed that respondent would supply

cash and chemicals for the manufacture of methamphetamine and would also be responsible for distribution, while McKeon and co-conspirator William Levan would actually manufacture the drug (*id.* at 2a).

McKeon and Levan made three attempts to manufacture methamphetamine in Philadelphia between December 1979 and April 1980. The first "cook" was successful, producing three pounds of methamphetamine, which McKeon delivered to respondent. McKeon, Levan, and respondent shared a profit of $19,500 on that transaction. The second "cook" failed to produce methamphetamine because a necessary ingredient supplied by respondent turned out to be some other substance. A third "cook" succeeded in producing three and one-half pounds of methamphetamine, which Levan delivered to respondent (App., *infra*, 3a).

Sometime around May 1980, McKeon went to Cape May, New Jersey, with the liquid residue from the third "cook." He met respondent, Levan, and co-conspirator John Lazaro, as well as two others not named as co-conspirators, at an empty house McKeon believed to be rented through Lazaro. There they attempted to extract additional methamphetamine from the liquid residue. This "drying" resulted in less than an ounce of low quality product, which McKeon promptly sold for $200 (App., *infra*, 3a).

In the early morning hours of May 23, 1980, two local police officers surreptitiously entered the Cape May house pursuant to a search warrant and removed a tray covered with drying methamphetamine. With permission of the issuing magistrate, the officers delayed returning an inventory, leaving the participants to speculate about what had happened to the missing tray (App., *infra*, 3a).

On May 25, 1980, two DEA agents observed a meeting between respondent and Lazaro alongside Lazaro's car in the parking lot of a restaurant in Philadelphia. At one point, one of the agents observed respondent lean into the car. After Lazaro drove off, the agents overtook and stopped his car. They searched the car, as well as Lazaro and his wife Marianne, who was a passenger at the time. During the search, Marianne Lazaro threw away a clear plastic bag containing a white powder that her husband had handed to her after the meeting with respondent. Finding nothing, the agents allowed the Lazaros to leave. Eight hours later, one of the agents returned to the scene of the stop and found a clear plastic bag containing a small quantity of methamphetamine (App., *infra*, 3a-4a).[1]

From May 23 to May 27, 1980, the Cape May County Prosecutor's Office lawfully intercepted five telephone conversations between various participants in the conspiracy; the taped conversations were played for the jury at trial. In one conversation, Lazaro asked respondent, in code, for a quantity of methamphetamine and reported on the residue missing from the Cape May house, suggesting that "Mike" probably took it. In another conversation, Lazaro and respondent arranged the meeting in the parking lot. In a third conversation, Lazaro reported to respondent that he kicked "that piece" under his car during the May 25 stop by the DEA agents, and he wondered how the agents were tipped off (App., *infra*, 4a-5a).

[1] Marianne Lazaro, who was named as an unindicted co-conspirator and who testified for the government under a grant of use immunity, denied that the bag found by the agent was the same one that her husband had given her (App., *infra*, 4a).

Additionally, in a conversation between McKeon and Marianne Lazaro, the latter described the May 25 incident and suggested that respondent might have set them up. McKeon assured her that respondent was not an informant. In the final intercepted conversation, Levan and John Lazaro discussed the missing residue and speculated about who had set Lazaro up for the May 25 stop (App., *infra*, 5a).

2. At trial, respondent sought to exclude the recorded statements of John Lazaro and the other co-conspirators on the ground that the statements did not satisfy the requirements of the co-conspirator exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E) (3 Tr. 285). He also challenged Lazaro's statements on Confrontation Clause grounds, arguing that that provision requires the government to establish that the nontestifying co-conspirator is unavailable to testify (*id.* at 285-286). The district court ruled that all the co-conspirator statements satisfied the requirements of Rule 801(d)(2)(E) (5 Tr. 574).[2] Without expressly deciding whether the Confrontation Clause required the government to establish Lazaro's unavailability, the district court admitted Lazaro's statements in reliance on the government's representation that Lazaro would refuse to testify whether or not he had a valid Fifth Amendment privilege and

[2] Three of the five conversations of Lazaro that were admitted were conversations with respondent (App., *infra*, 4a-5a) and thus may have constituted adoptive admission. Fed. R. Evid. 801(d)(2)(B); see also, *e.g.*, 4 D. Louisell & C. Mueller, *Federal Evidence* § 424 (1980); *McCormick's Handbook on the Law of Evidence* § 270 (E. Cleary 2d ed. 1972) [hereinafter cited as *McCormick on Evidence*]. However, this ground for admission was not urged or ruled on below.

was therefore unavailable (3 Tr. 292-293; 5 Tr. 574-575).[3]

3. On appeal, respondent reiterated his contention that the admission of John Lazaro's recorded statements violated both the co-conspirator exception to the hearsay rule and the Confrontation Clause. The court of appeals held that Lazaro's statements fell within the coverage of the co-conspirator rule (App., *infra*, 8a-11a). However, the court went on to accept respondent's contention that the Confrontation Clause requires the government to show that a nontestifying co-conspirator is unavailable to testify as a foundation for admitting his out-of-court statements, and that the government had failed to make an adequate showing of Lazaro's unavailability in this case (*id.* at 11a-13a).

In imposing an "unavailability" requirement under the Confrontation Clause, the court of appeals relied almost exclusively (App., *infra*, 12a) on this Court's dictum in *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case * * * the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." The court of appeals found no reason for excepting co-conspirator statements from "the clear constitutional rule laid

[3] Of the other co-conspirators whose out-of-court statements were used, McKeon and Marianne Lazaro both testified at trial under grants of immunity, and Levan properly asserted his Fifth Amendment privilege outside the presence of the jury (App., *infra*, 15a n.6). The government also subpoenaed John Lazaro to appear in order to establish his unavailability, but Lazaro failed to do so at the appointed time, allegedly because of "car problems" (4 Tr. 408).

down in *Roberts*" (App., *infra*, 12a). The court added (*id.* at 13a) that "it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage."

The court rejected the government's argument that Lazaro's unavailability had in fact been established (App., *infra*, 13a-16a). The government had represented to the district court that Lazaro was adamantly refusing to testify and was prepared to go to jail for contempt (*id.* at 15a). The government had also subpoenaed Lazaro, but he had failed to appear, claiming "car troubles" (*ibid.*). The court of appeals suggested that the government should have requested a bench warrant to secure Lazaro's presence (*ibid.*) and insisted that nothing less than "an actual assertion of privilege and exemption by ruling of the court" would suffice to prove unavailability (*id.* at 16a). The court therefore reversed and remanded for a new trial (*ibid.*).

4. The government petitioned for rehearing with suggestion for rehearing en banc. First, the government challenged the panel's holding that under the Confrontation Clause the prosecution must show that a nontestifying co-conspirator is unavailable to testify in order to be able to introduce his out-of-court statements at trial. In addition, the government argued that, even if the court were correct in so holding, it erred in remanding for a new trial instead of for a limited hearing to determine whether Lazaro was in fact unavailable to testify and whether his testimony would have been helpful to the defense—since only then would any purpose be served by holding a new trial. The court of appeals denied the petition with four judges dissenting (App., *infra*, 20a).

REASONS FOR GRANTING THE PETITION

1. This case presents a question of great practical and doctrinal importance that has sharply split the courts of appeals. The introduction of co-conspirator declarations is an event that occurs thousands of times each year in criminal prosecutions across the land, and that heretofore has generally been thought not to be conditioned upon any showing of unavailability. And as cases like *Ohio* v. *Roberts*, 448 U.S. 56 (1980), show, a determination of unavailability can often be burdensome and controversial. Whether the Confrontation Clause imposes this substantial burden on the criminal trial process is a question that plainly warrants resolution by this Court.

a. Statements made by co-conspirators in furtherance of a conspiracy have long been exempt from the hearsay rule. See, *e.g.*, 4 J. Wigmore, *Evidence in Trials at Common Law* § 1079 (J. Chadbourn ed. 1972) [hereinafter cited as *Wigmore on Evidence*]; *McCormick on Evidence* § 267, at 645-646. This exemption is codified in traditional form in Fed. R. Evid. 801(d)(2)(E). Proof of the declarant's unavailability to testify at trial has never been a prerequisite for admission of such statements. Fed. R. Evid. 801(d)(2)(E); 4 *Wigmore on Evidence* § 1079; *McCormick on Evidence* § 267.

The co-conspirator rule is one of the most important and most frequently invoked exceptions to the hearsay rule. Following this Court's decision in *Ohio* v. *Roberts*, however, much confusion has developed among the lower courts regarding the constitutionality of the traditional co-conspirator rule. See *Sanson* v. *United States*, No. 83-6454 (June 25, 1984) (White, J., dissenting from denial of certiorari); *Means* v. *United States*, No. 83-6866 (Nov. 26, 1984), slip op. 1 n.1 (Brennan and White, JJ., dissenting from denial of certiorari). In the present case, the Third Circuit, purporting to follow *Roberts*, held that the admission of co-conspirator statements falling within Fed. R. Evid. 801(d)(2)(E) is barred by the Confrontation Clause unless the government produces the declarant or shows that he is unavailable to testify. Similarly, the Ninth Circuit recently held that the government had violated the Confrontation Clause by introducing entries made in drug ledgers by unidentifiable co-conspirators. *United States* v. *Ordonez*, 737 F.2d 793, 802 (1984). The court faulted the government for failing to prove "that these unidentified persons were not available to testify at trial or that a good faith effort had been made to obtain their testimony" (*ibid.*). But see *United States* v. *Snow*, 521 F.2d 730, 736 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976) (expressly rejecting "unavailability" requirement).

In addition, two other courts of appeals, in post-*Roberts* opinions, have suggested in dictum that proof of the declarant's unavailability may be a constitutional prerequisite for admission of co-conspirator statements. However, these courts went on to find that such a showing had been made in the cases before them. *United States* v. *Lisotto*, 722 F.2d 85, 88 (4th Cir. 1983), cert. denied, No. 83-1417 (Mar. 26, 1984); *United States* v. *Peacock*, 654 F.2d 339, 349-350 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983).[4]

---

[4] In earlier decisions, however, these same courts had taken the contrary view and held that the Confrontation Clause is coextensive with the co-conspirator exemption. See *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 & 457 U.S. 1136 (1982); *United States*

In stark contrast to these decisions, other courts of appeals have concluded that statements falling within the co-conspirator rule automatically satisfy Confrontation Clause standards. *E.g.*, *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *United States* v. *McManus*, 560 F.2d 747, 750 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Swainson*, 548 F.2d 657, 661 (6th Cir.), cert. denied, 431 U.S. 937 (1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); see also *United States* v. *Dunn*, No. 84-1236 (1st Cir. Mar. 29, 1985), slip op. 19; *United States* v. *Ordonez*, 737 F.2d at 812-814 (Norris, J., dissenting).[5]

Similar division and confusion is evident among the state courts. Compare *State of Arizona* v. *Martin*, 139 Ariz. 466, 479-480, 679 P.2d 489, 502-503 (1984) (court unsure whether unavailability necessary under

---

v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981). See also *United States* v. *Johnson*, 575 F.2d 1347, 1362 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979).

[5] Other circuits have taken the position that statements admissible under the co-conspirator rule must be scrutinized on a case-by-case basis to determine whether they are sufficiently reliable to satisfy the Confrontation Clause. See, *e.g.*, *United States* v. *Wright*, 588 F.2d 31, 38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Roberts*, 583 F.2d 1173, 1175-1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Kelly*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Snow*, 521 F.2d 730, 734-736 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). However, none of these cases holds that proof of the declarant's unavailability is a prerequisite for admission of co-conspirator statements.

Roberts; holds that co-conspirator/declarant must be produced or shown to be unavailable where there is doubt as to accuracy or reliability of statement), and *State* v. *Smith*, 353 N.W.2d 338, 341 (South Dakota 1984) (co-conspirator exception and Confrontation Clause "co-extensive" except in "unusual circumstances"), with *State* v. *Bauer*, 109 Wis.2d 204, 212-213, 325 N.W.2d 857, 862 (1982) (unavailability must be shown except in "special circumstances"). In light of the conflicting decisions of the federal courts of appeals and state courts and the apparent general confusion concerning this important issue, review by this Court clearly is warranted.

b. In our view, there is no basis for the position that the Confrontation Clause imposes a requirement of unavailability or any other requirements that go beyond those embodied in the traditional co-conspirator rule. The courts reaching a contrary conclusion have relied almost exclusively upon the *Roberts* dictum. App., *infra*, 11a-13a; *Ordonez*, 737 F.2d at 802; *Lisotto*, 722 F.2d at 88; *Peacock*, 654 F.2d at 349-350; see also *United States* v. *Gibbs*, 739 F.2d 838, 852-854 (3d Cir. 1984) (en banc) (Rosenn, J., dissenting). But they have plainly misinterpreted *Roberts* by placing too much reliance on language taken wholly out of context.

Roberts considered and rejected a Confrontation Clause challenge to the admission of testimony given at a preliminary hearing. No issue regarding the admission of co-conspirator statements was involved. In dictum, however, the Court observed (448 U.S. at 65):

> In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavail-

ability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Barber* v. *Page*, 390 U.S. 719 (1968). See also *Motes* v. *United States*, 178 U.S. 458 (1900); *California* v. *Green*, 399 U.S. at 161-162, 167, n.16.[7]

---

[7] A demonstration of unavailability, however, is not always required. * * *

We believe that this statement, in context, meant only that the Confrontation Clause, like the hearsay rule, limits the admission of hearsay and that proof of the declarant's unavailability is sometimes a prerequisite for the admission of hearsay falling within one of the rule's exceptions. To the extent that the Court suggested that unavailability must be proved "[i]n the usual case" (448 U.S. at 65), the Court surely was referring to the admission of former testimony, a hearsay exception that has traditionally demanded such a showing. See Fed. R. Evid. 804(b)(1). This, of course, was the exception at issue in *Roberts*, as well as in each of the four cases cited by the Court: *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Barber* v. *Page*, 390 U.S. 719 (1968); *Motes* v. *United States*, 178 U.S. 458 (1900); and *California* v. *Green*, 399 U.S. 149 (1970).

The court below in this case, and other like-minded courts of appeals, have read the *Roberts* dictum with unquestioning literalness to mean that co-conspirator statements—and presumably other traditionally admissible out-of-court statements—are generally barred by the Confrontation Clause unless the declarant's unavailability is shown. This is a revolutionary proposition that the *Roberts* Court could not have intended to adopt in such an offhand manner. Under the Federal Rules of Evidence promulgated by this Court,

there are 23 specific types of hearsay that are admissible "even though the declarant is available as a witness" (Fed. R. Evid. 803). By contrast, there are only four hearsay exceptions—including former testimony—that require unavailability (Rule 804). Thus, if the court of appeals' reading of *Roberts* were correct, most of the traditional hearsay rule, which this Court endorsed in issuing the Federal Rules of Evidence, would contravene the Confrontation Clause. This seems most doubtful.

Elsewhere in *Roberts* the Court observed (448 U.S. at 66) that the reliability of hearsay statements "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." We believe that a similar approach is appropriate with respect to the requirement of unavailability. The traditional exceptions to the hearsay rule embody the thinking and experience of generations of judges, legislators, scholars, and practitioners, developed on the basis of considerations quite similar, if not identical, to those that would inform any Confrontation Clause inquiry. As the advisory committee note to Rule 804(b) explains: "Rule 803 *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility." It is dubious that anything would be gained by reexamining this judgment under the uncertain light of the Confrontation Clause. The language of the Clause itself does not illuminate any of the difficult practical problems; indeed, "[i]t is common ground that the historical understanding of the clause furnishes no solid guide to adjudication." *Dutton* v.

Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring).

This Court has twice considered the relationship between the Confrontation Clause and the co-conspirator rule—in *Delaney* v. *United States*, 263 U.S. 586 (1924), and in *Dutton*—and those decisions support the view that statements falling within the traditional co-conspirator rule present no Confrontation Clause problems. In *Delaney*, 263 U.S. at 590, a Confrontation Clause challenge to the admission of co-conspirator statements was summarily turned aside. In *Dutton*, the Court upheld a state co-conspirator exception that went far beyond the traditional federal rule. Writing for the plurality, Justice Stewart noted and appeared to disapprove (400 U.S. at 80) the lower court's interpretation of the Confrontation Clause, because it would "require[] a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether * * * it is supported by 'salient and cogent reasons.'" The plurality continued (*ibid.*): "[W]e do not question the validity of the coconspirator exception applied in the federal courts." Justice Harlan, the fifth member of the majority, would have gone further and held that the Confrontation Clause does not regulate the admission of hearsay, whether falling within a firmly rooted exception or not.

c. Besides its mechanical reliance on the *Roberts* dictum, the court of appeals in this case provided scant explanation for its conclusion that unavailability must be proven. The court merely observed (App., *infra*, 13a): "[I]t does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage." The court's ap-

parent reasoning—that the government does not need to introduce co-conspirator statements unless the declarant is unavailable—makes no sense and is in fact inconsistent with the court of appeals' disposition of this case itself.

Co-conspirator statements, unlike certain types of hearsay such as former testimony (Fed. R. Evid. 804(b)(1)), are not admitted on the theory that they are the best available substitute for unavailable live testimony. Instead, they are admitted because they have a discrete and independent probative value. The same is true for most of the other traditional hearsay exceptions for which unavailability need not be shown (see Fed. R. Evid. 803). A co-conspirator's live testimony is not a substitute for statements that he made during and in furtherance of the conspiracy any more than live testimony is a substitute for an excited utterance (Fed. R. Evid. 803(2)) or for a recorded recollection of "a matter about which [the] witness * * * now has insufficient recollection to enable him to testify fully and accurately" (Fed. R. Evid. 803(5)). The court of appeals implicitly recognized this point when it found no fault with the admission of out-of-court statements by those conspirators who testified at trial (see App., *infra*, 15a & n.6). But the court does not seem to have understood the implications of this result for its Confrontation Clause analysis.

The other explanation sometimes given for requiring a demonstration of the co-conspirator/declarant's unavailability is that the prosecutor should be forced "to put forward the best case he has against the defendant." Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378,

1403 (1972). This explanation, which suggests that prosecutors introduce co-conspirator statements because they do not wish to exert the effort needed to locate and produce the co-conspirator as a witness, is surprisingly blind to the realities of criminal prosecutions. A co-conspirator is almost always chargeable with a criminal offense. If he was a major participant in the illegal scheme, he will certainly be wanted for prosecution. And even if he was only a minor figure, the prosecution will usually be interested in exploring the possibility of obtaining his testimony, which may be far more devastating to the other conspirators than his out-of-court statement standing alone. For these reasons, we believe it would be quite rare for prosecutors to be indifferent to the whereabouts of conspirators or their availability as witnesses. When co-conspirator statements are offered and the declarant is not called as a witness it is usually because (a) the co-conspirator is thought still to be in league with the defendant on trial; (b) he is certain to take the Fifth Amendment or otherwise refuse to testify; or (c) he is truly beyond the law's reach.

In any event, if a showing of unavailability is ever to be required, it can be justified only where the prosecution and the defense have unequal access to the declarant—as, for example, where the declarant is in a witness protection program.[6] In the present case, the declarant Lazaro's whereabouts were equally known to the prosecution and the defense. Lazaro

[6] Even in those circumstances, the problem presented is more aptly classified as relating to a defendant's right to compulsory process, not confrontation, and should arise only where the defendant affirmatively seeks to secure the declarant's presence as a witness, something respondent never displayed the slightest interest in doing.

was subpoenaed by the government but failed to appear due to "car problems" (see page 6 n.3, *supra*), and neither side pursued the matter further. If the defense had really wanted to obtain Lazaro's testimony and thought that he would waive any Fifth Amendment protection, it could and surely would have taken further steps. In reality, it seems quite clear that respondent's sole real interest was simply to nurture an issue to be raised on appeal.

2. Even assuming the court of appeals was correct in holding that the government must establish the co-conspirator/declarant's unavailability in order to be able to introduce his out-of-court statements, this case presents a second issue of substantial importance to the administration of criminal justice: whether the court of appeals erred in remanding for a new trial when the error it identified may have had no actual impact on the course of the first trial.[7]

[7] This is a recurring problem. For example, in *United States* v. *Van Dyke*, 643 F.2d 992 (4th Cir. 1981), the court of appeals reversed a conviction and remanded for a new trial based on a Fourth Amendment violation. At the time of trial, the defendant had "automatic standing," but by the time of the appellate decision, the automatic standing doctrine had been overruled in *United States* v. *Salvucci*, 448 U.S. 83 (1980). The court of appeals recognized (643 F.2d at 995) that on remand the government should be allowed to show that the defendant's own Fourth Amendment rights had not been violated, in which case the same evidence could again be admitted at retrial. But the court rejected the suggestion in our rehearing petition that it should order a remand hearing rather than a retrial, even though retrial would be pointless if the evidence remained admissible.

Likewise, in *United States* v. *Johnson*, 594 F.2d 1253 (9th Cir.), cert. denied, 444 U.S. 964 (1979), the court of appeals reversed convictions obtained following an exceptionally lengthy and complex trial and remanded for a new trial on

It is our submission that, rather than reflexively ordering a new trial, the court of appeals should have remanded for a limited hearing to determine whether Lazaro was in fact unavailable to testify, as the government contended. If Lazaro was unavailable, any error in failing to establish that fact as a foundation for admission of his statements was plainly harmless. Moreover, it would be utterly pointless to conduct a new trial that would be the same as the trial respondent already had received. Such a new trial would not only waste a week of the court's time, but also would result in a serious imposition on all of the parties and would diminish the resources available to give prompt and fair trials to other defendants. See *United States* v. *Gibbs*, 739 F.2d 838, 857-858 (3d Cir. 1984) (en banc) (Seitz, J., dissenting). Moreover, even if a limited remand hearing established that Lazaro would have testified, retrial would be unnecessary if the district court determined beyond a reasonable doubt that Lazaro's cross-examination would not have been helpful to the defense and that the violation of respondent's right to confronta-

---

the ground that the government had failed to make the foundational showing required by Fed. R. Evid. 1006 for introduction of certain summary charts. The court denied our rehearing petition, which argued that the appropriate disposition in the first instance was to remand for a hearing at which the opportunity would be afforded the government to establish that a proper foundation existed for admission of the summaries.

Such reflexive ordering of a new trial, without considering the sufficiency of a more limited remand, may result in substantial injustice if reprosecution is precluded or hampered by the passage of time. At the very least, scarce judicial and prosecutorial resources are squandered by wholly unnecessary retrials at which the same evidence heard at the first trial is admissible at the second.

tion was therefore harmless. *E.g.*, *United States* v. *Hasting*, 461 U.S. 499 (1983).

A limited remand hearing for the purposes we have stated would not give the government a "second bite at the apple." At trial, there was no apparent need for the government to call Lazaro to the stand in order to establish his unwillingness to testify because the district court did not require the government to do so; insofar as the district court required a showing of unavailability at all, it was content to rely on the government's representation that Lazaro would refuse to testify whether or not he had a valid Fifth Amendment privilege. A limited remand hearing would give the government an opportunity to do what it has all along maintained it could do: establish Lazaro's unavailability.

This Court has expressly recognized the advantage of remanding for a limited hearing that would give the trial court an opportunity to correct its error and could thereby obviate the need for retrial of the entire case. Thus, in *Goldberg* v. *United States*, 425 U.S. 94 (1976), the Court remanded the case to the district court for a determination whether, under the correct standard, the particular writings in question there qualified as Jencks Act material that the government should have produced. *Id.* at 111. In so doing, the Court stated (*id.* at 111-112; footnote omitted):

> [W]e do not think that this Court should vacate [petitioner's] conviction and order a new trial, since petitioner's rights can be fully protected by a remand to the trial court with direction to hold an inquiry consistent with this opinion. The District Court will supplement the record with findings and enter a new final judgment of convic-

> tion if the court concludes after the inquiry to reaffirm its denial of petitioner's [Jencks Act] motion. This procedure will preserve petitioner's opportunity to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the material, or part of it, to petitioner, and that the error was not harmless, the District Court will vacate the judgment of conviction and accord petitioner a new trial.

See also, *e.g.*, *Waller* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 9-11; *United States* v. *Wade*, 388 U.S. 218, 242 (1967); *Jackson* v. *Denno*, 378 U.S. 368, 394 (1964); *Brady* v. *Maryland*, 373 U.S. 83, 88-91 (1963); *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961). The court of appeals here should have followed the same procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

APRIL 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1882

UNITED STATES OF AMERICA

v.

INADI, JOSEPH, Joseph Inadi, APPELLANT

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Crim. No. 83-00108-01)

Argued: July 20, 1984

[Filed November 13, 1984]

OPINION OF THE COURT

Before: ADAMS, HIGGINBOTHAM and
VAN DUSEN, *Circuit Judges*

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

Defendant Joseph Inadi appeals from his conviction on charges arising out of an alleged conspiracy to manufacture and distribute narcotics. Disposition of this appeal requires that we resolve a recurring question that has twice eluded determination by this

court, *see United States v. Gibbs*, 739 F.2d 838 (3d Cir. 1984) (in banc); *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 344 (1983): Does the Sixth amendment require the government to show that a non-testifying coconspirator is *unavailable* to testify, as a foundation for admitting that coconspirator's out-of-court statements under Federal Rule of Evidence 801(d)(2)(E)? We hold that the Confrontation Clause does require such a showing, and because in our view the government has not met this burden we will reverse the judgment of the district court.

I.

Joseph Inadi was indicted in the Eastern District of Pennsylvania on charges of conspiring to manufacture and distribute methamphetamine, and on four related narcotics charges. The conspiracy count alleged that Inadi combined with John Lazaro, Jr., Michael McKeon, William Levan and other persons known and unknown. The government later named Marianne Lazaro—John Lazaro's wife—as the only additional unindicted coconspirator.

The government's case featured the testimony of two unindicted coconspirators and two Drug Enforcement Agency (DEA) agents, as well as five telephone conversations recorded through a tap on the Lazaros' phone. Unindicted coconspirator Michael McKeon testified, under a grant of use immunity, that he approached Inadi in September of 1979, when McKeon was seeking a distribution "outlet" for methamphetamine. Under an agreement they reached, Inadi was to supply cash and chemicals for the manufacture of methamphetamine and was also to be responsible for distribution, while McKeon and William Levan were to actually manufacture the substance.

McKeon testified that he and Levan made three attempts to manufacture ("cook") methamphetamine in Philadelphia between December of 1979 and April of 1980. The first cook was successful, producing three pounds of methamphetamine, which McKeon later delivered to Inadi. McKeon, Levan, and Inadi shared a profit of $19,500 on that transaction. The second cook failed to produce methamphetamine because the phenyl-2-propanol ("P2P") supplied by Inadi—a necessary ingredient—turned out to be some other substance. A third cook succeeded in producing three-and-one-half pounds of methamphetamine, which Levan delivered to Inadi.

According to McKeon, sometime after the third cook, probably in May of 1980, he went to Cape May, New Jersey with the liquid residue from the third cook. There he met Levan, Inadi, and John Lazaro, as well as two others not named as conspirators, at an empty house McKeon understood to be rented through Lazaro. They attempted to extract additional methamphetamine from the liquid residue. This "drying" resulted in less than an ounce of low quality product, which McKeon promptly sold for $200. In the early morning hours of May 23, 1980 two Cape May Police Officers surreptitiously entered the house pursuant to a warrant and removed a tray covered with drying methamphetamine. With permission of the issuing magistrate the officers delayed returning an inventory, leaving the participants to speculate over what had happened to the missing tray.

DEA agents Ellis Hershowitz and Nicholas Broughton testified that they observed a meeting between John Lazaro and Inadi on May 25, 1980. Lazaro and Inadi stood alongside Lazaro's car in the parking lot at "Frankie Masters" Restaurant in

Philadelphia and spoke for several minutes. Agent Broughton testified that he saw Inadi lean into Lazaro's car during this meeting. After Lazaro drove off the DEA agents overtook and stopped the car. They searched the vehicle, as well as Lazaro and his wife Marianne, who was a passenger at the time. Finding nothing, the agents allowed the Lazaros to leave. Some eight hours later Agent Hershowitz returned to the scene of the stop and search and found a clear plastic bag containing a small quantity of a white powder later identified by a government expert as methamphetamine.

Under a grant of use immunity, Marianne Lazaro testified that she was seated in the Lazaro car throughout the May 25, 1980 meeting between Inadi and John Lazaro. She did not see Inadi lean into the car. She further testified that after the meeting with Inadi her husband handed her a clear plastic bag containing white powder, which she put in her bra. While the DEA agents were searching the car, Marianne Lazaro removed the bag from her bra and threw it away. She denied that the bag and powder found by Hershowitz, and introduced as a government exhibit, were the items that her husband had given her.

The linchpins of the government's case were five telephone conversations recorded between May 23 and May 27, 1980 by the Cape May County Prosecutor's Office as part of their own investigation of Lazaro. The jury heard three conversations between Inadi and John Lazaro—one recorded on May 23, in which Lazaro seems to ask, in code, for a quantity of methamphetamine for the weekend, and reports on the residue missing from the Cape May house, suggesting that "Mike" probably took it; another recorded on the morning of Sunday, May 25 arranging the meeting at

Frankie Masters; and one recorded on May 27 in which Lazaro reports that he kicked "that piece" under his car during the May 25 DEA stop, and wonders how the agents were tipped off.

In a conversation between McKeon and Marianne Lazaro recorded on May 27, she describes the May 25 incident and suggests that Inadi might have set them up. McKeon assures her that Inadi was not an informant. In a May 27 conversation between John Lazaro and William Levan, there is further discussion of the missing Cape May residue (with Lazaro again suggesting that "Mike" took it), and more speculation over who set Lazaro up for the May 25 stop.

The district court admitted Inadi's recorded statements as admissions of a party-opponent under Fed. R. Evid. 801(d)(2)(A), and the recorded statements of McKeon, Levan, and the Lazaros as coconspirators' admissions under Fed. R. Evid. 801(d)(2)(E). All were received as substantive evidence over the strenuous objections of defense counsel. Shortly after listening to the May 27 Lazaro/Levan conversation for the second time, the jury returned a verdict of guilty on all counts against Inadi.

II.

In this appeal, Inadi contends: (1) that the tape recordings were inadmissible because the government failed to prove their authenticity; (2) that use of John and Marianne Lazaros' recorded statements for the truth of what they asserted was contrary to Fed. R. Evid. 801(d)(2)(E), because there was insufficient independent evidence that they were coconspirators; and (3) use of John Lazaro's recorded statements violated the Confrontation Clause, in that Laz-

aro was neither produced to testify in court nor shown to be available to testify. We will consider each of Inadi's contentions in turn.

A.

Inadi challenges the admissibility of all five tape recordings played at trial on the grounds that the government failed to meet the authentication requirements of *United States v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975) (requiring the government to produce clear and convincing evidence of authenticity as a foundation for admitting tape recordings) and 18 U.S.C. § 2518(8)(a) (1982) (requiring the presence of a seal made under judicial direction, or a "satisfactory explanation for the absence thereof," as a prerequisite to using wiretap recordings as evidence). The district court rejected these contentions after a pretrial evidentiary hearing.

The record shows that the original tapes were properly sealed under judicial direction and placed in the evidence vault at the county prosecutor's office upon completion of the Lazaro wiretap on June 9, 1980, but that they were inadvertently unsealed on December 29, 1980 by Cape May County Detective Andrew R. Vaden. Detective Vaden mistook the originals for work copies that were also stored in the vault, and he played them for defense attorneys involved in related New Jersey prosecutions. The tapes were then returned to the vault and, upon discovery of the error, resealed on January 29, 1981. Inadi does not challenge the government's explanation for the inadvertent unsealing, but rather argues that there was an unexplained break in the chain of custody—another unsealing—prior to December 29. Inadi points to testimony that the tapes were originally sealed in

bundles of five, wrapped in clear cellophane (or "scotch") tape, and that all the bundles were placed in a sealed outer cardboard carton. He compares this to the testimony of Detective James R. Brennan—the evidence custodian—that when he first saw the tapes in the evidence vault on June 10, 1980 the outer carton may have been open, and the testimony of Detective Vaden that the tapes were sealed is grey "duct" tape on December 29, 1980.

We do not, however, find that the record is unambiguous as to whether the outer carton was formally sealed under judicial direction, nor do we believe that this extra precaution would be necessary. Moreover, we believe that in the light of detailed testimony that the tapes were subject to appropriate security, the district court was justified in discounting Detective Vaden's testimony regarding the type and color of the sealing tape. The very fact that Detective Vaden did not notice that, as the record clearly shows, each individual tape box and plastic reel was marked "original" suggests that his attention on December 29, 1980—nearly three years before he testified—was not focused on the physical condition of the evidence. (Detective Brennan testified that he really did not think about which set of tapes he was giving to Vaden, and Vaden testified that he assumed Brennan would not give him the originals.) The fact that the tapes were resealed with grey duct tape on January 29, 1981 might be the source of confusion. Thus, though the handling of this evidence was less than exemplary, we cannot say that the district court erred in finding that the government had met its burden under *Starks* and § 2518.

B.

Inadi next contends that the recorded statements of John and Marianne Lazaro were inadmissible hearsay. The Federal Rules of Evidence exclude from their definition of hearsay [1] any out-of-court statement that is "offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). This court has held that out-of-court statements may not be admitted as substantive evidence under this rule unless the government has established the existence of the alleged conspiracy and the connection of the declarant to it "by a clear preponderance of evidence independent of the hearsay declarations." *United States v. Continental Group*, 603 F.2d 444, 457 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980). Without the requirement of independent proof of a conspiracy, "hearsay would lift itself by its own bootstraps to the level of competent evidence," *Glasser v. United States*, 315 U.S. 60, 75 (1942). We find that the district court applied the correct legal standard in determining the admissibility of the Lazaro statements, and our review is limited to the question of whether, viewing the evidence in the light most favorable to the government, the district court had "reasonable grounds" for concluding that, more probably than not, John and Marianne Lazaro were coconspirators. *United States v. Jannotti*, 729 F.2d 213, 218 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3259 (U.S. Oct. 9, 1984).

---

[1] "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fed. R. Evid. 801(c).

In determining whether there was enough independent evidence that the Lazaros were coconspirators to bring their statements within the hearsay exception, we are mindful that "this element in the exception coincides with the elements that comprise the crime of conspiracy," Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 335 (1984) (footnote omitted). We therefore review some basic principles of the substantive law of conspiracy.

The *agreement* to commit an unlawful act is itself the act proscribed by the crime of conspiracy. "It is enough if the parties tacitly come to an understanding in regard to the unlawful purpose, and this may be inferred from sufficiently significant circumstances . . . ." R. Perkins & R. Boyce, *Criminal Law* 684 (3d ed. 1982) (footnote omitted); *see also United States v. Georgia*, 210 F.2d 45 (3d Cir. 1954). The mental element of conspiracy is twofold: there must be both intent to conspire and intent to commit the underlying offense. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978), "[A]iding a conspiracy with knowledge of its purposes suffices to make one a party to the conspiracy," W. LaFave & A. Scott, *Handbook on Criminal Law* 463 (1972). Finally, we note that where a number of parties combine to manufacture, distribute, and retail narcotics there is a single conspiracy—a so-called "chain" conspiracy—despite the fact that there has been no direct contact whatsoever amongst some of its links. *Id.* at 480-81.

Against this background, we cannot say that the district court lacked reasonable grounds, based on nonhearsay evidence, for concluding that the Lazaros were probably Inadi's coconspirators. There was in-court testimony that John Lazaro was present at

the Cape May drying, and that he had rented the empty house where it took place.[2] There was direct testimony of a meeting between Inadi and Lazaro, and sufficient circumstances to permit the inference that a quantity of methamphetamine passed between them on that occasion. We believe that this evidence constituted reasonable grounds for concluding that John Lazoro was probably a link in the chain of methamphetamine distribution and was therefore Inadi's coconspirator.

The nonhearsay evidence of Marianne Lazaro's participation was somewhat weaker. We have only her testimony that after the meeting with Inadi her husband asked her to hold a bag of white powder, that she put the bag in her bra, and that she threw the bag away while DEA agents were searching the Lazaro car. Though she professed not to know what the white powder was or where her husband had obtained it, when she was asked if there were "drugs in the car at the time that the Federal agents stopped the car?" she reported, "I had a white plastic bag with a white powder in it." App. at 732. We believe that her behavior could reasonably support the inference that she knowingly came to the aid of the conspiracy, and thereby became still another link in the chain that extended back to the defendant Inadi.

---

[2] Inadi now contends that Michael McKeon's testimony on this point may itself have been inadmissible hearsay. We do not find, however, that defense counsel made a contemporaneous objection that would have enabled opposing counsel to clarify the source of McKeon's knowledge. We therefore deem this contention to be waived on appeal. Fed. R. Evid. 103(a). *See also* United States v. Gibbs, 739 F.2d 838, 849-50 (3d Cir. 1984) (in banc).

In addition to independent evidence that the declarants conspired with the defendant, Rule 801(d)(2)(E) requires that the proffered statements be "during the course and in furtherance of the conspiracy." There is no indication in the record that the conspiracy had been abandoned during the period of May 23-27 when the recordings were made; indeed this appears to have been a time of peak activity. We also find that the "in furtherance" requirement has been met. Two of the conversations apparently involved arrangements for a drug transaction that was an integral part of the conspiracy count. The others —although they contained some extraneous matter— served to "provide reassurance. . . . to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy . . . ." *Ammar*, 714 F.2d at 252. We conclude, therefore, that the government laid the foundation for admission of the Lazaros' out-of-court declarations required by Fed. R. Evid. 801(d)(2)(E). We now turn to Inadi's constitutional claim.

C.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. Although the Confrontation Clause has never been construed to bar all use of out-of-court statements as evidence of criminal guilt, *Dutton v. Evans*, 400 U.S. 74, 80 (1970), it is clear that it imposes requirements separate from, and sometimes more stringent than, the hearsay rule and its many exceptions, *see Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980). We recently acknowledged that "no exact equation exists between Fed. R. Evid.

801 and the Confrontation Clause. . . . thereby raising the possibility that evidence that satisfies Fed. R. Evid. 801(d)(2)(E) could still be deemed inadmissible under the constitutional test." *Gibbs*, 739 F.2d at 847. Inadi argues that the government, as the proponent of the tape-recorded out-of-court statements, was constitutionally required to either produce the declarants for cross-examination,[3] or to prove that they were *unavailable* to testify in court. We agree that the government must meet this burden.

In *Roberts* the Supreme Court held that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65. Though the government argues that it is not required to show the unavailability of a nontestifying coconspirator-declarant, it does not suggest any reason why we should create an exception to the clear constitutional rule laid down in *Roberts*.[4] We, too, are unable to find any reason for the exception to the unavailability requirement the government would have us adopt. In-

[3] "[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 158 (1970).

[4] The Supreme Court did suggest, in a footnote, that "[a] demonstration of unavailability . . . is not always required." 448 U.S. at 65 n.7. As an example, the Court cited *Dutton*, where the "utility" of trial confrontation was "so remote that it did not require the prosecution to produce a seemingly available witness." *Id.* The government, however, does not rely on this exception, and we do not find it applicable here.

deed, with commentators increasingly of the view that the broad coconspirator exception to the hearsay rule can only be justified as a matter of necessity[5]—that is, necessitated by the difficulty of proving conspiracy and related offenses—it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage. We therefore hold that the government must show that a nontestifying coconspirator is *unavailabile* to testify as a foundation for admitting that coconspirator's out-of-court statements under Fed. R. Evid. 801(d)(2)(E). *Accord, United States v. Lisotto*, 722 F.2d 85 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1682 (1984); *United States v. Ordonez*, 722 F.2d 530 (9th Cir. 1983).

III.

The government contends that even assuming, as we have now held, that it bears the burden of producing the coconspirator-declarants or proving that they are unavailable, they have met that burden in this case. Thus we must determine what constitutes a showing of "unavailability" sufficient to satisfy the Confrontation Clause.

We believe that Fed. R. Evid. 804(a), which defines "unavailability" for the hearsay exceptions that have traditionally required such a foundation in both civil and criminal cases, is an appropriate starting point. It provides:

[5] *See, e.g.*, 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, 801-169 to -171 (1981); Mueller. *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 335 (1984); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*. 52 Mich. L. Rev. 1159, 1166 (1954).

"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

Under *Barber v. Page*, 390 U.S. 719, 724-25 (1968), a case involving the admissibility of former testimony, "absence" of a witness will not constitute "unavailability" for purposes of applying the Confrontation Clause "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." In *Barber*, which arose out of a state prosecution in Oklahoma, the hearsay declarant was in a federal prison in Texas. The prosecutors did not seek a writ of habeas corpus *ad testificandum* from either the state or federal courts, although both routes were available. "The right of confrontation," the Court said, "may not be dispensed with so lightly." 390 U.S. at 725.

We believe that Rule 804(a) and *Barber*, together, establish the *minimal* showing of unavailability that

will satisfy the Confrontation Clause. It is clear that with respect to John Lazaro[6] the government has failed to meet even this minimum threshold.

The government has taken, at various stages in these proceedings, several different approaches to establishing John Lazaro's unavailability. It first asked the trial judge to rely on the assurances of government counsel that Lazaro was adamantly refusing to testify and was prepared to go to jail for contempt. Such predictions by government counsel cannot be recognized as the equivalent of the actual scenario where a witness has appeared in court and refused to testify after a court order. Every veteran trial judge has experienced the situation where a hostile witness discards his "stonewalling" tactics when faced with an imminent contempt citation.

When Lazaro failed to appear under a subpoena issued at the district court's suggestion, the government reported that he was prevented from attending by car troubles. Government counsel did not request a bench warrant, nor does it appear that they made any additional effort to compel his attendance at trial. We can safely assume that counsel's conduct would have been considerably more aggressive had counsel felt it was necessary in order to "win". Under such circumstances, counsel would have sought a bench warrant and refused to assume that the judicial process is so impotent that a witness' hostility is a basis for making no effort. Counsel's efforts here clearly do not constitute a "good faith effort" under *Barber*.

---

[6] Of the other coconspirators whose out-of-court statements were used, Michael McKeon and Marianne Lazaro both testified at trial under grants of immunity, and William Levan appeared and, outside the presence of the jury, properly asserted his fifth amendment privilege.

Finally, on appeal the government asks us to take judicial notice that Lazaro probably could have asserted his fifth amendment privilege had he appeared. Even if we were inclined to consider this position, which was never asserted below, we would not find an adequate showing of unavailability absent an actual assertion of privilege and exemption by ruling of the court. Unlike defendants, witnesses have no blanket right to stand mute; we cannot say on the basis of this record that John Lazaro would have asserted the fifth amendment privilege. We conclude that the government failed to show that John Lazaro was unavailable to testify, and therefore the district court erred in admitting his out-of-court statements.[7]

CONCLUSION

For the reasons set forth above, the judgment of conviction will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

[7] Inadi has raised a number of other claims of error. In view of our disposition of the Confrontation Clause claim, we find it unnecessary to reach the merits of these other issues.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1882

UNITED STATES OF AMERICA

v.

INADI, JOSEPH, Joseph Inadi, APPELLANT

[Filed: Feb. 8, 1985]

ORDER AMENDING OPINION

Before: ADAMS, HIGGINBOTHAM and VAN DUSEN, *Circuit Judges*

It is ordered that the wording of the opinion filed November 13, 1984, and formerly amended on November 27, 1984, as it appears in the Federal Reporter of the West Publishing Company paperback issue of January 14, 1985 (748 F.2d No. 2 & 749 F.2d No. 1), at 748 F.2d 812-820, is further amended as follows:

In line 19 of the right-hand column on 748 F.2d 818, "establish" shall be substituted for "prove."

The following shall be added after the last sentence of part II of the opinion at 748 F.2d 819, line 17 of the left-hand column:

> "Of course, under our decision in *Gibbs*, *supra*, a defendant must make a specific and timely

objection to preserve the unavailability issue for appeal. It is clear that Inadi has done so here."

The second sentence of part III, 748 F.2d 819 shall be amended to read: "Thus we must determine what constitutes a showing of "unavailability" sufficient to satisfy the Confrontation Clause in this case."

The following shall be added after the last complete sentence of the text in the right-hand column. 748 F.2d 819: "In the context of this case, such assertions are not sufficient."

The second sentence of the first full paragraph on 748 F.2d 820 is amended to read: "For example, government counsel did not request a bench warrant, nor does it appear that they made any additional effort to compel his attendance at trial."

The following shall be added as footnote 7, following the word "privilege" on line 40 of the left-hand column, 748 F.2d 820:

> 7. Of course, we decide this case on the basis of the record before us, where the declarant had not asserted the privilege before any judicial officer or anyone authorized to take oaths. We do not deal with any exceptional circumstance where the trial judge has a record—for example, in the form of an affidavit—that clearly establishes that the declarant would claim the privilege and that requiring him to appear in court would be a meaningless formality. Thus, there is an ambit of discretion reserved to the district judge contingent upon the specific facts of the case.

Footnote 7, 748 F.2d 820, shall be renumbered as footnote 8.

BY THE COURT,

A. Leon Higginbotham, Jr.
Circuit Judge

Dated: February 8, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1882

UNITED STATES OF AMERICA

v.

INADI, JOSEPH, Joseph Inadi, APPELLANT

(E.D. Pa. Crim. No. 83-00108-01)

[Filed Feb. 8, 1985]

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and VAN DUSEN, *Circuit Judges*

The petition for rehearing filed by the United States of America, appellee, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing before the court in banc, the petition for rehearing is denied. Judge Hunter, Judge Garth, Judge Sloviter, and Judge Becker would grant the petition for rehearing.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: February 8, 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10189